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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1468

SALVATORE VAVOLIZZA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1969

SALVATORE VAVOLIZZA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Salvatore Vavolizza, respectfully prays that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, rendered February 25, 1970, affirming the denial of petitioner's application under Title 28 § 2255 of the United States Code, without a hearing whereby he sought to vacate a judgment of conviction predicated upon his plea of guilty for the crimes of conspiracy (18 U.S.C. § 371) and a substantive violation in connection with obtaining first preference immigration visas (18 U.S.C. § 1001 (77-A-83-A)*

The Petitioner was fined $7500.00 under Count 1 (Conspiracy) and to one year of unsupervised probation under Count 10 (18 U.S.C. § 1001).

* Figures in parentheses refer to pages of the Appellant's Appendix in the Court of Appeals unless otherwise indicated.

Opinion Below

The Court of Appeals for the Second Circuit affirmed the judgment of conviction on the 5th of February, 1970 without opinion. (See Appendix I, infra).

Questions Presented

I—Whether petitioner's constitutional rights under the Fifth Amendment were denied by the trial Court's refusal to grant him a hearing in connection with his application to vacate the judgment of conviction and the plea of guilty upon which it was based?

II—Whether petitioner was denied a Sixth Amendment right to effective assistance of counsel when his trial attorney convinced him to plead guilty despite his protestations of innocence?

III—Whether the trial court violated petitioner's constitutional rights under the Fifth and Sixth Amendments when it accepted his plea of guilty despite the fact that petitioner declared in open court that he did not believe he had committed a crime?

IV—Whether, as a matter of constitutional right, a defendant is entitled to an evidentiary hearing when he alleges that his plea of guilty was involuntary and based upon a lack of understanding of what was occurring?

V—Whether petitioner's rights under the Sixth Amendment and under Rule 48(b) of the Federal Rules of Criminal Procedure were violated by virtue of the unusually long delay between indictment and trial (February, 1963 to October, 1968)?

Constitutional and Statutory Provisions Involved

The Fifth and Sixth Amendments of the United States Constitution are involved herein. In addition, Sections 371, 1001, 3281 of Title 18 United States Code, and Rules 11 and 48 (b) of the Federal Rules of Criminal Procedure are likewise pertinent.

Introductory

There appears to be no doubt that Vavolizza had a right to bring on this proceeding under 28 U.S.C. § 2255, since his status on "probation" was found to be "custody" within the purview of the law. (*United States* v. *Re*, 372 F. 2d 641, 643 (2 Cir. 1967), Cert. denied, 388 U. S. 912 (1967).

The opinion of the United States District Court for the Southern District of New York is reported at Appendix II, infra.

Statement of the Case

The petitioner was originally represented by Otto Fusco, Esq. who unfortunately suffered a heart attack and moved to withdraw as counsel and to have Theodore Kreiger, Esq. substituted in his place and stead. On October 3, 1968 with the consent of all parties this was done. Paradoxically, however, Kreiger was now representing three of the four defendants on trial, Vavolizza, Birbano and Quartarolo (30A-32A).

While the Court did inquire as to a possible conflict of interest (a fact which in itself would seem to indicate that this was cause to believe one existed), the defendants all agreed to this joint representation. This is quite interesting

in itself since Quartarolo did not plead guilty while Vavolizza and Birbano did (39A-40A).

The jury ultimately "hung" on the other two co-defendants, including Quartarolo, who did not plead guilty and a *nolle prosequi* was subsequently entered as to them (81A).

At the time that the Court conducted the allocution as to sentence, the petitioner Vavolizza stated that he never realized that he had violated the law and that he relied solely on his attorney's advice as to that (73A):

> "The Court: Mr. Vavolizza, is there anything you want to add to what your counsel has said?
>
> "The Defendant: No, except that *if I violated the law I was never aware of it.*"

In his moving affidavit herein, the Appellant alleges that he notified the probation officer immediately after taking the plea of guilty, that he was not guilty, and that he did not know why his attorney nevertheless insisted that he plead? (13A-14A).

His attorney told him that unless he took a plea that he would get a much more severe sentence than otherwise. (id).

Affidavits by Birbano and Quartarolo were annexed which corroborate the allegations of the Petitioner (17A-21A).

Otto Fusco, Esq., the attorney for the Petitioner prior to Kreiger, also submitted an affidavit which indicated that at all times Vavolizza insisted upon his innocence when discussing the case with Fusco (22A-24A).

The Court denied a hearing and accordingly there is no opposing affidavit from Kreiger and no refutation of the underlying facts of the moving papers.

The opposing affidavit relied primarily upon the transcript of the Court proceedings which did not reveal whether or not the Petitioner's attorney indicated that a plea would save his client from a possibly more severe sentence.*

POINT I

The main issue involved in this petition for certiorari is whether or not the courts below erred in not affording petitioner an evidentiary hearing on his application to vacate his conviction under 28 U.S.C. § 2255.

Petitioner had been indicted on February 26, 1963 at which time he pled "Not Guilty", and retained one Otto Fusco, Esq., as his attorney.

During an inordinately long hiatus which followed this indictment, petitioner consistently maintained his position that he was innocent of any charges and that he wanted to go to trial.

On or about October 3, 1968, another attorney, Theodore Kreiger, Esq., was substituted as counsel because petitioner's former attorney, Otto Fusco, suffered a heart attack. On the day of trial, Kreiger answered "Ready" when the case was called (34A).

At this juncture, it is important to note that Kreiger undertook to represent three of the four persons on trial, namely, petitioner, Martin Birbano and Domenico Quartarolo. That there was an obvious conflict of interest seems clear since following the commencement of trial, but before the Jury retired to deliberate a verdict, Kreiger advised the Trial Court that two of his three clients, namely, Vavo-

* The Government also revealed that there had been electronic surveillance. (This fact may involve constitutional issues.) (27A)

lizza and Birbano, desired to withdraw their "Not Guilty" pleas and interpose a plea of guilty.

Fusco, the attorney who had represented Vavolizza for approximately 5½ years following his indictment, declared that throughout the time that he represented Vavolizza, the petitioner consistently declared that he was innocent of any charges and showed no inclination to do anything other than go to trial (22A-24A).

The petitioner also filed an affidavit with the Trial Court (12A-16A) wherein he maintained that he never wanted to plead guilty and that he was pressured into doing so by his new attorney, Theodore Kreiger, who indicated that he would receive a much stiffer sentence if he persisted in continuing the trial, than he would receive if he pled guilty.

The co-defendant, Birbano, likewise, pled guilty, and he, too, stated that he was pressured into doing so by his same new attorney, Theodore Kreiger (17A-21A).

It must be borne in mind that Vavolizza had not been in prior conflict with the law and is not a native-born American but rather emigrated to this Country from Italy (cf.: *Spano* v. *United States*, 360 U. S. 315 at 323).

In addition, Vavolizza declared in Court (73-A):

"* * * *If I violated the law, I was never aware of it.*"

In his moving affidavit, Vavolizza further declared that immediately following his plea of guilty, he notified the Probation Officer that he was not guilty (13A-14A).*

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* If a hearing had been granted, petitioner indicates that he would have testified that he never believed that he committed a crime and that as a matter of fact, he does not think that even now the facts would prove the commission of a crime. He further indicates that the Government, without advising him of his rights

The opposing affidavit by the Government relied primarily upon the transcript of the proceedings in open Court which did not reach the issue of Vavolizza's allegations that he believed he would receive a more severe sentence unless he pleaded guilty nor that he was unfamiliar with the entire process by which the Court halted his participation in the trial and accepted a guilty plea. (25A-28A).

Finally it should be noted that the decision to plead guilty was reached over a weekend during the pendency of the trial itself.* Vavolizza's attorney, Kreiger, according to petitioner, telephoned the United States Attorney over the weekend and worked out a plea involving only two of his three clients. Quartarolo, who was also then on trial and was likewise represented by Kreiger, received a *nolle prosequi*, and of course will not be prosecuted ever again.

The allegations contained in the moving affidavits and in the colloquy among the Court, the petitioners, and counsel, are somewhat typical of this procedure involving pleas of guilty. There is of course, a pretentious articulation of the fact that no promises or understandings had been reached. Yet it is submitted that virtually no plea of guilty is ever con-

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shortly before his arrest, compelled him to turn over many of his files, without a warrant. (*Kaufman* v. *United States*, 394 U.S. 217 (1969).

In addition to the foregoing, Vavolizza declares that he would have testified that he was completely unaware of the options that the Trial Court extended to him to vacate his plea of guilty at the time of sentence since he was unconversant with the legal technicalities and also suffers a hearing difficulty. Furthermore, the Court spoke in very low conversational tones and was addressing his attorney rather than himself. Finally, Mr. Vavolizza would testify that he never knowingly or wilfully pled guilty and to this day insists upon his innocence. He would maintain that Kreiger insisted that he "cop out", which was an unfamiliar expression to him, despite his protests of innocence.

* The meeting was a surprise to Vavolizza and placed him under great stress.

summated without conversations between counsel for the Government and the accused, and frequently, with the Court itself.

It is unthinkable and contrary to common sense, that without any promise whatsoever, the defendant (petitioner here) would have pled guilty to two counts of multi-count indictment, without the slightest understanding as to possible punishment or possible consequences.

It is submitted further that there must have been "Plea Bargaining".

McCarthy v. *United States*, 394 U.S. 459 (1969);
Shelton v. *United States*, 246 F.2d 571 (5th Cir. 1957) rev'd on "confession of error" by Solicitor General, 356 U.S. 26 (1958);
U.S. ex rel. McGrath v. *LaVallee*, 319 F.2d 308 (2d Cir. 1963);
United States ex rel. Elksnis v. *Gilligan*, 256 F. Supp. 244 (S.D.N.Y. 1966 and cases cited therein).

See, also,

"Note, Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas", 112 U.Pa.L. Rev. 865-71 (1964);
Polstein, "How to 'Settle' a Criminal Case," 8 Prac. Law. 35, 37 (1962).

The Court herein should once and for all recognize that guilty pleas are not suddenly arrived at out of the clear blue sky. If a defendant at any time articulates that a "promise" or "understanding" was brought to his attention, he will be foreclosed from pleading and lose the "bargain".

In the interesting colloquy between the District Court (N.D. Ill.) and the Seventh Circuit, it appears that giving a

person more time for not pleading guilty is common place but is to be condemned. (See, *United States* v. *Wiley,* 184 F.Supp. 679 (N.D. Ill. 1960); *United States* v. *Wiley,* 267 F.2d 453 (7th Cir. 1959); 278 F.2d 500 (7th Cir. 1960); *United States* v. *Wiley,* 184 F.Supp. 679 (N.D. Ill. 1960).

It is uncontradicted that the defendant-petitioner's counsel told him that he would receive a longer sentence unless he pleaded guilty (provided he were to be convicted).

> "A policy designed to deny defendant a suspended sentence solely because he demanded a jury trial is contrary to law, and an unjustifiable denial of defendant's rights to have his application for a suspended sentence considered upon its merits." (*Gillespie* v. *State,* 355 P.2d 451, 456—Okla. Crim. App. 1960; *United States* v. *Wiley, supra,* 184 F. Supp. at 685).

The Courts below were well aware of the fact that Kreiger had just come into the case and heard the petitioner say that he was unaware of the fact that he had been violating the law. The Courts also knew that Vavolizza had complained to the probation officer that he was innocent even after pleading guilty. Yet, no hearing was held.

This cannot be said to have complied with the standards suggested in such cases as *Boykin* v. *Alabama,* 395 U.S. 238. (See, also, *Munich* v. *United States,* 337 F.2d 356 (9 Cir. 1964)).

The factor in this case that is most alarming is that the Petitioner, without contradiction, has said that his plea was in essence "coerced" by counsel who after all is an officer of the Court. Yet no hearing has been afforded.

What the outcome of a hearing might be cannot be gainsaid, but certainly a hearing at the very least should have

been afforded. Just as the consequences of a guilty plea were not fully explained in the *Munich* case, supra, so it is that in the case at bar the severe economic and social ramifications were not detailed.*

Just as important is that this Court should recognize that plea bargaining is now commonplace and that Courts must probe whether or not a guilty pleader believes that he will be treated more leniently because he has pled guilty than he would be if he exercised his constitutional right to trial.

There has been a growing recognition by courts of the existence and pervasiveness of plea bargaining. To a still indefinite extent the practice has received official sanction. In *Barbar* v. *Gladden,* a federal district court said: (220 F. Supp. 308, 314 [D. Ore. 1963])

> These are commonplace occurrences [pleas of guilty to lesser included offenses] in courts throughout the country. We do it in the Federal District Court. On multiple count indictments, we often accept pleas of guilty to one or two counts. * * * In many courts, particularly State courts, a defendant's lawyer and the prosecutor may bargain not only on the offense, but also on the length of the occurrence which the prosecutor will recommend.
>
> It is an integral part of the administration of justice in the United States.

In *Anderson* v. *North Carolina,* 221 F.Supp. 930, 934 (N.C. 1963) the district court specifically assumed the "constitutional validity of the time-honored compromise plea" in determining that the defendant lacked effective representation since he was without legal assistance in negotiating the plea arrangement. Moreover, the Supreme Court of

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* The petitioner alleges he has suffered severe economic and social penalties because of the plea of guilty.

Michigan has taken judicial notice of the prevalence of plea bargaining in that state.

Judicial recognition has probably spurred an increase in plea bargaining activity and thereby multiplied the number of guilty pleas. In the *Munich* case, supra, a similar problem was resolved by the Court. It held that a defendant who is unaware that he is ineligible for parole or probation, does *not* plead guilty voluntarily. Munich had pleaded guilty to a narcotics charge while represented by retained counsel. As in the instant case, Munich proceeded under §2255.

Rule 11, F.R. Crim. P. requires a court to determine if a plea is voluntary before accepting it. At 459 of 337 F. 2d, the Court explained:

> "The rule is mandatory, even where the defendant is represented by court-appointed counsel (Kadwell v. United States, 9 Cir., 315 F.2d 667, 669), or by counsel retained by the defendant. As pointed out in the Diggs and Gundlach decisions, however, the presence of counsel is a circumstance which may fairly be taken into account in determining the nature and extent of the inquiry to be made."
>
> *United States* v. *Diggs*, 6 Cir., 304 F. 2d 929, 930; *Gundlach* v. *United States*, 4 Cir., 262 F.2d 72, 76; *United States* v. *Davis*, 7 Cir., 212 F.2d 264, 267.

The petitioner suffered economic and social pressures and ostracism which were not explained to him in the plea bargaining process.

In the recent case of *United States* v. *McCarthy*, 394 U.S. 459 (1969), it is manifest that strict compliance with procedures for determining a voluntary plea of guilty are mandated by this Court.

It is respectfully submitted that those standards have not been met in "this case".

In its *McCarthy* opinion the court pointed out:

> "A defendant who enters such a plea simultaneously waives several constitutional rights including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.' *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." 394 U.S. at 466.

While the case at Bar may not be on all fours with the *McCarthy* case, nevertheless, there seems to have been a gross injustice to the petitioner which should and can be rectified by the direction of a hearing.

POINT II

The petitioner consistently maintained his innocence in this case from the time of the indictment in February 1963 until the time of the plea in October 1968. This case should be reversed on general principles of due process and under rule 52(b), F.R. Crim. P., for plain error since so much time elapsed between indictment and trial.

While it may be true that the second circuit is looked upon as a "demand" circuit so far as speedy trial is concerned, yet the hiatus herein is so great that it should be deemed to be prejudicial as a matter of law.

In *Hanrahan* v. *United States,* 348 F. 2d 363 (D. C. Cir. 1965), the Court of Appeals declared (*id.* at 366):

> "Rule 48(b), Fed R. Crim. P., if in the Sixth Amendment, in terms requires the prosecutor to proceed without 'unnecessary delay'. The prosecutor's responsibilities under these provisions begin, not when the indictment is returned, but when the prosecution is begun."

See also *Cannady* v. *United States,* 351 F. 2d 817, 818 (D. C. Cir. 1966); *United States* v. *Kojima,* 3 Hawaii Fed. 381 (1909); *United States* v. *Henning,* 15 F. 2d 760, 861 (9th Cir. 1926); *United States* v. *Sanchez,* 361 F. 2d 824 (2 Cir. 1966); *United States* v. *Rivera,* 346 F. 2d 942 (2 Cir. 1965); *United States* v. *Hammond,* 360 F. 2d 688 (2 Cir. 1965); *United States* v. *Wilson,* 342 F. 2d 782 (2 Cir.), cert. denied, 382 U. S. 960; *United States* v. *Simmons,* 338 F. 2d 804, 806 (2 Cir. 1964); cert. denied, 380 U. S. 983.

See also *D'Ercole* v. *United States,* 361 F. 2d 211 (2 Cir. 1966); *United States* v. *Lustman,* 258 F. 2d 475 (2 Cir. 1958).

See also, 2 Pomeroy, Equity Jurisprudence, §§418, 419 (5 Ed. 1941); 2 Story, Equity Jurisprudence §1526 (13 Ed. 1886).

It should be noted, incidentally, that while the Court in *Sanchez, supra,* distinguishes the *Ross* case as being an exercise of supervisory powers by a sister circuit, the sweeping pronouncements in *Ross* clearly transcend mere supervisory jurisdiction.

In *United States* v. *Lustman, supra,* the Court considered the effect of a very prolonged delay from the point of view of whether "prejudice" need be shown. At 258 F. 2d 477, 478, this Court declared:

> ". . . A showing of prejudice is not required when a criminal defendant is asserting a constitutional right." [Citing cases.] Continuing, the Court explained:
> *"Thus we assume that the unexcused delay of approximately four years was an undue delay within the meaning of the Sixth Amendment even though appellant has not shown that it prejudiced him in the prosecution of his defense."* (Italics ours)

See:

> *Klopfer* v. *North Carolina,* 386 U.S. 213 (1967);
> *United States* v. *Ewell,* 383 U.S. 116, 120.

See also *Ross* v. *United States,* 349 F. 2d 210 (D. C. Cir. 1965). In *Ross,* the Court of Appeals (249 F. 2d at 211) proclaimed:

> " . . . We think a record of this kind *more accurately may be deemed as presenting a question akin to a Fifth Amendment due process issue,* centering around Appellant's ability to defend himself."*

* Since speedy trial issues can be raised any time before trial, it is even more perplexing to ponder why a 48(b) F. R. Crim. P. motion was not made by counsel, before considering other approaches.

In *Ross*, the Court observed that a delay between the commission of the offense and the prosecution of a protracted nature might well constitute a denial of due process of law. It should be noted that in *Ross* v. *United States, supra*, the Court was not merely articulating its supervisory power over district courts in Washington, D. C.

Cf.:

Mann v. *United States*, 304 F. 2d 394, 396-7 (D.C. Cir. 1962);
United States v. *Provoo*, 350 U.S. 857 (1955);
Pollard v. *United States*, 352 U.S. 354, 361-2 (1957).

Some courts have held a complaint and indictment may be delayed with impunity, without regard to the right to speedy trial, because the time of indictment is governed by the statute of limitations. See cases mentioned in *Mann* v. *United States, supra*. But the constitutional right cannot depend upon the terms of a statute. As an act of legislature, the period of limitations may be extended. See Act of September 1, 1954, c. 1214, § 12(a) (formerly § 10(a)), 68 Stat. 1145. The period may be done away with. Compare 18 U.S.C. § 3281 (1951). The period may be made to run from the time the offense becomes known to the authorities until the time of indictment, or from the time of indictment until the time of trial, or from the actual time of the offense until the time of trial. *Compare* LSA-R.S. 15:8 (1951) *with* La. Act No. 25 of 1960. The Legislature is free to implement the constitutional right and to provide protections greater than the constitutional right. *But the minimum right of the accused to a speedy trial is preserved by the command of the Sixth Amendment, whatever the terms of the statute.* And that minimum right is

measured by a flexible standard which takes account of all the circumstances. See *Beavers* v. *Haubert*, 198 U. S. 77, 87, 25 S. Ct. 573, 49 L. Ed. 950 (1905).

CONCLUSION

The Order of the United States Court of Appeals affirming the Order of the United States District Court For the Southern District of New York, denying petitioner's motion under 28 U.S.C. § 2255 should be vacated and the matter remanded with directions to conduct a full evidentiary hearing.

Respectfully submitted,

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APPENDIX I

Judgment of Circuit Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of February one thousand nine hundred and seventy.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. ROBERT P. ANDERSON,
Circuit Judge,

HON. THOMAS F. CROAKE,
District Judge.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SALVATORE VAVOLIZZA, *et al.*,
Defendants,

SALVATORE VAVOLIZZA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Appendix I—Judgment of Circuit Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX II

Opinion of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

63 CR. 190

UNITED STATES OF AMERICA

—against—

SALVATORE VAVOLIZZA, et al.,

Defendants.

MEMORANDUM

TENNEY, *J.*

Petitioner Salvatore Vavolizza was named in a seventy-three (73) count indictment[1] returned on February 26, 1963, in which he and three other defendants were charged with making false statements to the Immigration and Naturalization Service in connection with applications for first preference immigration visas in violation of 18 U.S.C. § 1001 and with conspiracy to commit this crime in violation of 18 U.S.C. § 371. Petitioner and defendants Quartarolo and Birbano were originally represented by Otto F. Fusco, Esq., who, in turn, retained Theodore Krieger, Esq., to prepare all pretrial motions and matters preliminary to trial. On October 3, 1968, Mr. Fusco moved to withdraw

[1] 63 Cr. 190.

from the case on the ground of personal illness and substitute Mr. Krieger as trial counsel for these three defendants. The motion was granted with the consent of all parties.[2] On October 7, 1968, Mr. Krieger advised his clients that although he was representing all of them, they were each entitled to separate counsel. However, each of them advised Mr. Krieger and the Court that they wished him to continue as their counsel. Further, the Court was assured by counsel, after its inquiry, that there existed no possibility of any conflict of interest arising from such joint representation.[3]

Trial commenced on Wednesday, October 9, 1968, before this Court and a jury. On Monday, October 14, 1968, during the progress of the trial, petitioner and defendant Birbano moved to withdraw their pleas of not guilty theretofore entered and substitute pleas of guilty to Counts 1 (the conspiracy count) and 10 (a substantive count) of the indictment. Both motions were granted after a *voir dire* examination conducted pursuant to Fed. R. Crim. P. 11 revealed to the Court's satisfaction that such pleas were entered knowingly and voluntarily, and based on the testimony elicited to date with respect to these two counts which satisfied the Court that these defendants were in fact guilty of the crimes charged.[4]

On October 22, 1968, a mistrial was declared as to the remaining two defendants after the jury announced that it was unable to reach a unanimous verdict.

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[2] Attached to Government's Affidavit in Opposition as Exh. A.

[3] Attached to Government's Affidavit in Opposition as Exh. A-1.

[4] Attached to Government's Affidavit in Opposition as Exh. B.

On February 7, 1969, the day of sentencing, Mr. Severio Muchio, Esq., was substituted as petitioner's counsel. Based on a letter received by the Court from petitioner and certain statements made by petitioner to his probation officer, the Court suggested that a motion to withdraw the guilty plea might be in order. The Court emphasized that in making such determination, petitioner should not rely on the sentence previously imposed upon defendant Birbano.[5] Despite this suggestion, no such motion was made, although petitioner asserted that he was not aware that he was violating the immigation law when he purposefully and intentionally committed the acts charged.[6] The Court then imposed a $7,500.00 fine with respect to Count 1, and a term of imprisonment of one year with respect to Count 10, execution of sentence suspended, and petitioner was placed on unsupervised probation for one year.

Petitioner now moves pursuant to 28 U.S.C. § 2255 to set aside his plea of guilty and to vacate the judgment of conviction and sentence imposed thereon.

Petitioner, placed on unsupervised probation for a period of one year, is "in custody" within the meaning of 28 U.S.C. § 2255. See *United States* v. *Re*, 372 F2d 641, 643 (2d Cir.), *cert. denied*, 388 U. S. 912 (1967). Unlike a motion to "correct manifest injustice" under Rule 32(a) of the Fed. R. Crim. P., the guilt or innocence of petitioner is not controlling in an application which collaterally attacks a judgment of conviction under 28 U.S.C. § 2255. *Watts* v. *United States*, 278 F.2d 247, 250-51 (D. C. Cir. 1960).

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[5] Birbano was committed to the custody of the Attorney General for a term of one year; execution of sentence was suspended, and defendant was pleaced on unsupervised probation for a period of one year. No fine was imposed.

[6] Attached to Government's Affidavit in Opposition as Exh. C.

As grounds for attacking his judgment of conviction, petitioner alleges that: 1) in accepting his plea the Court failed to comply with the "spirit, if not the letter" of Rule 11 of the Federal Rules of Criminal Procedure; 2) his counsel was enmeshed in a conflict of interest which prejudiced petitioner; 3) his plea was not entered voluntarily, but rather was the result of his counsel's pressure.

A thorough *voir dire* examination was personally conducted by this Court pursuant to Fed. R. Crim. P. 11, which revealed that petitioner: 1) understood the charges which he wished to plead to; 2) conferred with counsel with respect to these charges; 3) actually committed the acts which he was charged with; 4) had not been threatened or coerced into entering his plea, but was doing so voluntarily; 5) had not been promised that any particular sentence would be imposed by the Court if he pleaded guilty; 6) realized that the other counts of the indictment would remain open until the date set for sentencing and all that would remain for the Court to do upon its acceptance of the plea would be to impose sentence; and 7) was aware of the maximum sentence which could be imposed upon him. Additionally, the Court satisfied itself that there was a factual basis for the plea. Even if I were to assume that such an inquiry did not satisfy the mandate of the Supreme Court as set forth in *McCarthy* v. *United States*, 394 U.S. 459 (1969), that case is not applicable to pleas accepted prior to its date of decision, that is, April 2, 1969. *Halliday* v. *United States*, 394 U. S. 831 (1969).

As previously noted, Mr. Krieger, an able and experienced officer of this court, assured me that he was aware of no possibility of any conflict of interest arising from his joint representation of petitioner and defendants Quartarolo and Birbano, and they all knowingly and voluntarily accepted the risk

of sharing defense counsel. This, as was noted in *United States* v. *Armone*, 363 F.2d 385, 405-06 (2d Cir.), *cert denied*, 385 U. S. 957 (1966), sufficiently safeguarded any rights petitioner may have had in this matter. "The court must be allowed to accept an attorney's representations in matters of this kind, at least absent unusual circumstances [of which there were none present herein]." *Id.* at 406.

Of course, the fact that a larger fine than expected may have been imposed upon petitioner affords no grounds for setting aside the judgment of conviction and plea. *United States* v. *Norstrand Corp.*, 168 F.2d 481, 482 (2d Cir. 1948); *United States* v. *Shillitani*, 16 F.R.D. 336, 339 (S.D.N.Y. 1954). Nor do petitioner's assertions that he was pressured by counsel to plead guilty require a hearing in view of the fact that such assertions were negatived by his own prior declarations before this Court, *United States* v. *Shillitani*, *supra* at 340, and totally contradicted by the record and petitioner's conduct at sentencing.

The Government has filed a *nolle prosequi* as to the two co-defendants whose trial ended in a "hung jury" and declaration of mistrial. Petitioner, the principal and moving force behind this conspiracy, obviously seeks to invoke the discretion of this Court in the expectation that the Government will not initiate further prosecution against him. I cannot allow such a result.

Accordingly, petitioner's motion is in all respects denied.

So ordered.

Dated: New York, New York.
October 16, 1969.

CHARLES TENNEY
U.S.D.J.